IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN DANIEL APPEL	:	CIVIL ACTION
	:	
v.	:	
	:	
MARTIN HORN, et al.	:	NO. 97-2809

MEMORANDUM AND ORDER

YOHN, J. May 21, 1999

Martin Appel has filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (1994 & Supp. 1998).

On July 22, 1986, Appel pled guilty to three counts of murder and to related charges of attempted murder, assault, robbery, conspiracy, burglary and terroristic threats in the Northampton County Court of Common Pleas See Commonwealth v. Appel, No. 1076, 1077, 1078 - 1986, slip op. at 2 (Pa. Ct. C.P. Oct. 30, 1986). After a degree of guilt hearing, conducted from August 7-9, 1986, the trial court determined that Appel was guilty of three counts of first degree murder. See id. Appel was permitted to waive a jury determination of the appropriate penalty for his crimes, and instead asked for, and received, the death penalty. See id. Appel's conviction and death sentence were affirmed by the Pennsylvania Supreme Court on mandatory direct appeal. See Commonwealth v. Appel, 539 A.2d 780, 784 (Pa. 1988).

Seven years later, Appel began proceedings under Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. § 9541 et seq. (West Supp. 1998), after Governor Tom Ridge had signed his death warrant on February 28, 1995. The Northampton County Court of Common Pleas denied Appel's PCRA petition on June 14, 1995, and the Pennsylvania Supreme Court

affirmed. See Commonwealth v. Appel, 689 A.2d 891, 910 (Pa. 1997); Commonwealth v. Appel, No. 1076, 1077, 1078 - 1986, slip op. at 32 (Pa. Ct. C.P. June 14, 1995). Appel then filed this habeas petition.

In this habeas petition, Appel argues that his conviction and sentence are constitutionally infirm because (1) he was denied his Sixth Amendment right to the assistance of counsel during the time leading up to his competency hearing; (2) the prosecutor failed to disclose relevant Brady material; (3) he was deprived of a reliable competency evaluation; (4) the trial court was prevented from considering his mental illness as a factor mitigating against the imposition of the death penalty; (5) the trial court unconstitutionally applied the "witness elimination" aggravating factor in sentencing him to death; (6) he was tried and sentenced while incompetent; and (7) the cumulative effect of these errors made his conviction and sentence unconstitutional. See Petition for a Writ of Habeas Corpus and Consolidated Preliminary Memorandum of Law ("Petition"), at 4-5. The state asserts, in response, that none of these alleged errors amount to constitutional violations. See Answer to Petition for a Writ of Habeas Corpus ("Answer").

The most compelling of Appel's arguments is his contention that he was constructively denied his right to counsel between June 10, 1986, and June 20, 1986, the period before the state trial court accepted his waiver of counsel. See Petition, at 111-17. Appel contends that under United States v. Cronic, 466 U.S. 648, 653 (1984), he is entitled to a new trial because his counsel entirely failed to subject his court-ordered competency evaluation to "meaningful adversarial testing." Id. at 659-60. Specifically, Appel complains that his counsel failed to investigate, develop and present any factual information at all concerning his competence, that was readily available from his parents, his employment records, his girlfriend, his co-defendant

and his acquaintances, to either the psychiatrist who conducted his competency evaluation or the trial judge who conducted the hearing to determine his competency to waive counsel. Under Cronic, when counsel totally fails to act as counsel, no showing of prejudice is required and the Sixth Amendment is violated. After considering the parties' briefs,[1] their statements at oral argument, and the entire record of the state court proceedings, I conclude that I am constrained to grant the requested writ of habeas corpus under Cronic because Appel's right to counsel was denied during the time period preceding the trial court's acceptance of his waiver of counsel.[2]

FACTUAL BACKGROUND

On June 6, 1986, Martin Appel and Stanley Hertzog robbed the East Allen Township branch of the First National Bank of Bath. See Commonwealth v. Appel, No. 1076, 1077, 1078 - 1986, slip op. at 1 (Pa. Ct. C.P. Oct. 30, 1986). During the robbery, three bank employees were shot and killed, one bank employee was shot in the head but survived, and a customer was shot but survived. See id. Appel and Hertzog were apprehended later that day, and were charged with murder, robbery, and related crimes.[3] See id.

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[1] The Petitioner's last filing was his submission of a "Memorandum of Law Regarding the Court of Appeal's Recent Decision in Matteo v. Superintendent," which was filed on May 11, 1999. The state has informed the court by telephone that it does not wish to file a response to this memorandum.

[2] Because I conclude Cronic entitles Appel to relief on his denial of counsel claim, I need not reach the other grounds of error alleged in his habeas petition.

[3] On June 6, 1986, Appel appeared before District Justice Charles Kutzler for a preliminary arraignment. See Preliminary Arraignment Form, signed on June 6, 1986 at 8:50 p.m., by Charles A. Kutzler. During this proceeding, Appel was informed that he had the right to be represented by an attorney of his choice, or by a public defender, at his preliminary hearing, which was scheduled for June 16, 1986. See id. The form which Appel signed also provided instructions on applying for a public defender if he could not afford an attorney of his choice. See id.

On June 10, 1986, Appel filed an application for appointment of counsel with the Public Defender. See Transcript of PCRA hearing ("PCRA Tr."), May 12, 1995, at 145, 200. On the same day, the Public Defender assigned Ellen Kraft, Esq. and Lorenzo Crowe, Esq. to serve as Appel's attorneys and they entered appearances on Appel's behalf.[4] See Certified Docket Transcript in 1076-1986, at 3 ("061086 Attorney Lorenzo Crowe and Attorney Ellen Kraft Entered Appearance As P.d."); PCRA Tr. 5/12/95, at 145, 176, 200 (Kraft testifies that she was "appointed," "designated" or "assigned" to represent Appel); PCRA Tr. 5/15/95, at 3-4 (Crowe recalls that Appel had filed a request for a Public Defender). Kraft and Crowe first visited Appel in jail on June 11, 1986, and Appel immediately informed them that he did not want them to act as his attorneys. See PCRA Tr. 5/12/95, at 145, 200, 206; PCRA Tr. 5/15/95, at 4-5. Appel only asked for a Public Defender, Kraft testified, because he wished to receive visitors while he was in jail and had been told that he needed a lawyer in order to receive visitors. See Hearing Tr. 6/12/86, at 23; PCRA Tr. 5/12/95, at 146-47, 227; PCRA Tr. 5/15/95, at 4.

Despite Appel's protestations that he did not want Kraft and Crowe to represent him, Kraft and Crowe accompanied him to a hearing before the trial judge on June 12, 1986. On several occasions during that hearing, the trial judge referred to Kraft and Crowe as Appel's counsel, and they did not dispute that characterization.[5] See Hearing Tr. 6/12/86, at 2-3, 18. At

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[4] Unfortunately, neither Appel's application for a public defender nor Kraft's and Crowe's entries of appearance are part of the state court record available to the court; their entries of appearance are, however, confirmed by the state court docket included as a part of the record.

[5] At the beginning of the hearing the judge stated that he "would like to see Mr. Appel and counsel and the District Attorney in front of the bench," and Kraft and Crowe agreed with the court's statement that it "underst[oo]d that the Public Defender has designated you to represent Mr. Appel in the matters pending before this Court." Hearing Tr. 6/12/86, at 2. He then informed Appel that "these folks have been appointed to be your lawyers in this case." Id.

the June 12, hearing, Appel told the trial judge that he wished to proceed without counsel,[6] but the judge refused to accept Appel's waiver of counsel without a competency hearing. See id. at 23-24. By order dated June 12, 1986, the judge stayed all proceedings against Appel and ordered a psychiatrist to evaluate him "to determine his competency to waive counsel." Order 6/12/86 ("Upon receipt of the report from the psychiatrist, I will render my decision with regard to the waiver of counsel.").

On June 17, 1986, Appel was evaluated by Dr. Janet Schwartz, who found him competent to waive his right to counsel and submitted a report to that effect to the trial court. See Initial Psychiatric Evaluation, June 17, 1986, at 3 (Exhibit 1 to Commonwealth's Motion to Dismiss Appel's Petition for Relief Under the Pennsylvania Post-Conviction Relief Act Without Hearing). Neither Kraft nor Crowe provided Dr. Schwartz with any information concerning Appel's mental condition prior to her evaluation. Dr. Schwartz reported that "Mr. Appel appears to have made a rational and well thought out decision that he would like to receive the death penalty and would like this to occur as soon as possible. On the basis of my examination I feel

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at 3. Later, after informing Appel of the charges against him, the judge explained Appel's constitutional right to counsel, stating that "[i]f you cannot afford a lawyer, one will be appointed for you without charge. And that has occurred." Id. at 18. Later in the proceedings, the trial judge also commented that when Appel first appeared in court in June, "he expressed a desire to represent himself and not to have Court appointed counsel represent him." Hearing Tr. 8/7/86, at 4.

[6] Appel stated: "I would like to represent myself. I feel I am best able to project my own thoughts and express my desires speaking for myself in the case." Hearing Tr. 6/12/86, at 3. After listening to an explanation of the possible penalties he was facing, and the government's description of his crime, Appel again told the judge that he did not want Attorneys Kraft and Crowe to represent him. He stated: "[m]y choice is to represent myself. I have no objection to them as advisors." Id. at 21-22. He explained his decision by informing the judge that he felt that having counsel would "slow down the wheels of justice, the prosecution's case against me." Id. at 22.

that he is competent to make this decision and to refuse counsel." Id. After receiving Dr. Schwartz's report, the trial judge held a hearing on June 20, 1986, at which he accepted Appel's waiver of counsel based solely on the psychiatrist's report.[7] Neither Kraft nor Crowe provided any information relevant to Appel's competency to the court, or challenged the psychiatrist's conclusion in any way. See Hearing Tr. 6/20/86, at 4. After accepting Appel's waiver, the trial court appointed Kraft and Crowe to function as standby counsel under Pa. R. Crim. P. 318 (d). See id. at 3. Under Rule 318 (d), which is the same now as it was in 1986, Kraft and Crowe only became standby counsel when they were so appointed by the court. See Pa. R. Crim. P. 318 (d) (1989) ("When the defendant's waiver of counsel is accepted, standby counsel may be appointed for the defendant.").

When questioned during the PCRA hearing about their conduct from their entry of appearance on June 10, 1986, until the hearing to determine his competency to waive counsel on June 20, 1986, both Crowe and Kraft testified that they did not consider themselves to be Appel's counsel at that hearing, and had never considered themselves Appel's counsel prior thereto. Crowe testified that he collected no records concerning Appel's employment or military history

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[7] The court ruled as follows:

> The report from the psychiatrist, Doctor Janet Schwartz, indicates that you are competent to make the decision to waive counsel. The final sentence of her report is, "On the basis of my examination, I feel that he is competent to make this decision and to refuse counsel." Based thereon, sir, you having asserted your right to proceed without counsel, The Court accepts your waiver of counsel. I appoint Lorenzo Crowe, Esquire and Ellen Kraft, Esquire, assistant public defenders, to stand as standby counsel, pursuant to Pennsylvania Rules of Criminal Procedure, Rule 318 (d), to attend all proceedings and be available to the defendant for consultation and advice.

Hearing Tr. 6/20/86, at 2-3.

and undertook no other investigation because he considered himself standby counsel.[8] Kraft testified that Appel had never accepted her appointment as his attorney, and emphasized several times that she was never his counsel.[9]

Appel entered guilty pleas to all of the charges against him on July 22, 1986. See Hearing Tr. 7/22/86, at 48-49. After a degree of guilt hearing which lasted from August 7 to August 9, 1986, the trial court found Appel guilty of first degree murder for the shooting deaths of the three bank employees and imposed three death sentences for those murders. See Hearing Tr. 8/9/86, at 357, 375. When the time for filing post-verdict motions expired, on September 3, 1986, the court formally imposed the death sentences, and consecutive sentences on the related charges. See Sentencing Tr. 9/3/86, at 8-9. Though Appel chose not to file an appeal from his sentence, the

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[8] Crowe answered Appel's counsel's questions as follows:

Q: Did you or Miss Kraft secure any records, employment records, military records, any records at all regarding Mr. Appel's past?
A: No.
Q: And why not?
A: We were, I felt that we were standby counsel. I didn't think it was necessary. If he had required or requested us to present a defense or present something on his behalf, yes, we would have done those things.

PCRA Tr. 5/15/95, at 9.

[9] Kraft testified as follows: "Mr. Appel waived counsel from day one." PCRA Tr. 5/12/95, at 162; "Remember, we were not his attorneys." Id. at 165. "[W]e were specifically directed not to contact anybody in the family or his girl friend and we were not his attorneys." Id. at 167. "[H]e re-affirmed that we were not his attorneys." Id. at 168. "I wasn't his attorney so I must have discussed it with him and he must have agreed to [the second competency evaluation] or it wouldn't have occurred." Id. at 179. "[N]o, because we would have had to be his attorneys to [investigate defenses]" Id. at 195. "When we first met Mr. Appel he indicated to us from the beginning that he did not want us to represent him that he wanted to represent himself." Id. at 200. "He made that very clear from day 1 that he never wanted us as his attorneys." Id. at 206. "But he did not want us to represent him as his attorneys." Id. at 227. "[H]e didn't authorize us to act as his attorneys." Id. at 227. Kraft confirmed that she did not speak to Appel's family, id. at 164, his girlfriend, Yvonne Duggan, id. at 163-64, his co-workers, id. at 165-66, and did not obtain records from the police, id. at 162-62, or his employers, id. at 166, 169.

Supreme Court of Pennsylvania reviewed his conviction and sentence on an automatic direct review, and affirmed in 1988. See Commonwealth v. Appel, 539 A.2d at 784-85.

By the time a death warrant was signed by Governor Tom Ridge on February 28, 1995, Appel had changed his mind and began proceedings under Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. § 9541 et seq. (West Supp. 1998). Appel alleged that he was incompetent when he waived his right to counsel, pled guilty to all the charges against him, and requested the death penalty. See Petition for Relief Under the Pennsylvania Post-Conviction Relief Act, with Special Request for Leave to Amend ("PCRA Petition"), at 6-20. The trial court conducted an extensive evidentiary hearing at which Appel presented evidence to support his contentions that, during the summer of 1986, he suffered from a grandiose delusion that the bank robbery was a secret CIA mission designed to eliminate CIA "moles" and that he was honor-bound to protect the secrecy of his mission, and from hyperthyroidism caused by Graves Disease, which exacerbated his delusions. See, e.g. PCRA Tr. 5/8/95, at 355-73 (testimony of Dr. Henry Dee); PCRA Tr. 5/12/95, at 35-42 (testimony of Dr. Frank Dattilio); PCRA Tr. 5/16/95, at 20-55 (testimony of Dr. Jethro Toomer). Appel also argued that, had his attorneys conducted any investigation of his competency in 1986, they would have been able to produce information such as that produced during his PCRA hearings, that would have cast substantial doubt on his competency.[10] See PCRA Petition, at 7. The trial court denied Appel's PCRA petition on June

[10] At his PCRA hearing, Appel also presented evidence to support his assertion that, had his attorneys provided easily-obtainable background information to the psychiatrists who evaluated him in 1986, their conclusions might have changed. See PCRA Tr. 5/11/95, at 112, 218-65 (testimony of Dr. Schwartz equivocates about whether, in 1986, she would have concluded that Appel was competent if she had the information revealed during the PCRA hearing); Affidavit of Dr. Dolores Sarno-Kristofits (dated Oct. 8, 1997), ¶ 9-11 ("The information introduced at the PCRA hearing creates significant and substantial doubts about Mr.

14, 1995. See Commonwealth v. Appel, No. 1076, 1077, 1078 - 1986, slip op. at 32 (Pa. Ct. C.P. June 14, 1995). The Pennsylvania Supreme Court affirmed the denial of PCRA relief. See Commonwealth v. Appel, 689 A.2d 891, 910 (Pa. 1997). Appel then filed this habeas petition.[11]

STANDARD OF REVIEW

As Appel's habeas petition was filed after April 24, 1996, this court will apply the amended standards provided by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, 1219 (1996)**,** to review his state court conviction and sentence under § 2254.[12] AEDPA precludes habeas relief on a "claim that was adjudicated on the merits in State court proceedings" unless Appel can demonstrate that the state courts' decisions were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254 (d) (Supp. 1998); Matteo v. Superintendent, SCI Albion,

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Appel's competency in 1986. . . . I cannot say what the results of my evaluation would have been if I had been able to pursue these important matters initially.").

[11] The court conducted oral argument on two occasions, September 25, 1997, and March 24, 1998. In accordance with Rule 8 (a) of the Rules Governing § 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254 (1994), the court believes that an evidentiary hearing on Appel's petition is unnecessary, particularly in light of the extensive state PCRA hearing conducted between May 6, and May 19, 1995, and the absence of factual dispute about the events between June 10, 1986, and June 20, 1986. See Reese v, Fulcomer, 946 F.2d 247, 256 (3d Cir. 1991), cert. denied, 503 U.S. 988 (1992).

[12] AEDPA, which was enacted on April 24, 1996, amended the standard for review under § 2254, to require that federal courts give greater deference to decisions of state courts. See Dickerson v. Vaughn, 90 F.3d 87, 90 (3d Cir. 1996). AEDPA's standards should be used to evaluate petitions for federal habeas relief filed after its enactment. See Lindh v. Murphy, 117 S. Ct. 2059, 2063 (1997).

No. 96-2115, 1999 WL 164152, at * 6 (3d Cir. March 24, 1999) (en banc). This court must also presume that any factual issue determined by the state court is correct unless Appel can rebut that presumption by "clear and convincing evidence." 28 U.S.C. § 2254 (e)(1) (Supp. 1998); Berryman v. Morton, 100 F.3d 1089, 1102-03 (3d Cir. 1996). These standards apply to mixed questions of law and fact, such as whether counsel was ineffective, or whether a confession was voluntary. See id. at 1103.

In a recent opinion, the Third Circuit interpreted the level of deference which AEDPA requires federal courts to show to state courts' constructions of federal constitutional law. See Matteo, 1999 WL 164152, at *6. Matteo held that a two step analysis is appropriate to resolve issues falling within the scope of § 2254 (d) (1); the reviewing court

> must inquire whether the state court decision was "contrary to" clearly established federal law, as determined by the Supreme Court of the United States; second, if it was not, the federal court must evaluate whether the state court judgment rests upon an objectively unreasonable application of clearly established Supreme Court jurisprudence.

Id. at * 1. Though all of the judges agreed that this two-step inquiry was appropriate, several judges disagreed about the standard which should be used to evaluate each of these questions. In order to determine when a state court's opinion is "contrary to" federal law, the majority of judges agreed, the reviewing court must first decide "whether the Supreme Court has established a rule that determines the outcome of the petition" and then may only grant relief if "that Supreme Court precedent requires the contrary outcome." Id. at * 10 (adopting First Circuit's analysis from O'Brien v. Dubois, 145 F.3d 16, 24-25 (1st Cir. 1998)); id. at * 29 (McKee, J. concurring) (agreeing with "the majority's analysis of § 2254(d)(1)"). If the Supreme Court has not established a rule directly governing the claim at issue, the reviewing court must next,

according to a majority of the Third Circuit judges, determine whether "the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." Id. at * 11;id. at *24 n.3 (Becker, J. concurring) (objective standard applies to the "unreasonable application" inquiry). At this stage, the reviewing court may consider the decisions of inferior federal courts, as a "helpful amplification of Supreme Court precedent" when determining "whether the state court's application of the law was reasonable." Id. at *11.

By the statutory terms, however, AEDPA and the analytic structure outlined in Matteo apply only when the issue facing the reviewing court has been "adjudicated on the merits in State court proceedings." § 2254 (d); Matteo, 1999 WL 164152, at * 6. When the state court fails to reach the merits of an issue presented to a federal habeas court, AEDPA's deferential standards do not apply, and the reviewing court need not give special consideration to the state court's interpretation of federal law. See Fisher v. Texas, No. 97-50735, 1999 WL 107013, at * 4 (5th Cir. March 18, 1999) (refusing to "apply the AEDPA's deference standards to the state court's findings and conclusions" because state court dismissed petitioner's claim on a procedural ground rather than on its merits); Swann v. Taylor, No. 98-20, 1999 WL 86690 (4th Cir. Feb. 18, 1999) (concluding that AEDPA's standards do not govern review of a state court decision because the state court did not "mention or appear to apply the controlling federal precedent . . . nor does it cite or rely upon state precedents that, in turn, cite or rely upon [federal precedent]"); Smith v. Smith, 166 F.3d 1215, 1998 WL 764761, at * 2 (6th Cir. 1998) (refusing to apply AEDPA standards when state court denied relief on procedural grounds, and instead conducting de novo review of state court's decision); Moore v. Parke, 148 F.3d 705, 708 (7th Cir. 1998)

(holding that AEDPA's standards do not apply when state court petition was denied on procedural grounds rather than on the merits). The district court must, therefore, "exercise plenary review over state court conclusions on mixed questions of law and fact and pure issues of law," as the court would have done prior to the enactment of AEDPA. McCandless v. Vaughn, No. 97-1585, 1999 WL 171328, at * 3 (3d Cir. Mar. 30, 1999); see also Miller v. Fenton, 474 U.S. 104, 113-14 (1985) (under prior version of § 2254, federal court did not presume that state court findings on mixed questions of law and fact were entitled to presumption of correctness); Jones v. Ryan, 987 F.2d 960, 965-66 (3d Cir. 1993) (refusing to apply presumption of correctness to state court decisions which do not "provide a clear statement of the factual findings necessary to support the courts' legal conclusions").

DISCUSSION

The court first addresses the claim at the center of Appel's habeas petition, that he was constructively denied his Sixth Amendment right to the assistance of counsel during the time before the trial court accepted his waiver of counsel. See Petition, at 114-17.

I. Procedural Issues

A. Exhaustion

A federal court will ordinarily dismiss a petition for a writ of habeas corpus if the petitioner has not "fairly presented" each claim in his petition to the highest state court empowered to consider it, in order to give the state courts the "opportunity to pass upon, and correct, alleged violations of [] federal rights." Duncan v. Henry, 513 U.S. 364, 365 (1995) (per curiam); Castille v. Peoples, 489 U.S. 346, 349 (1989). A claim is "fairly presented" when the state court pleadings "demonstrate that [the petitioner] has presented the legal theory and

supporting facts asserted in the federal habeas petition in such a manner that the claims raised in the state courts are substantially equivalent to those asserted in federal court." Henderson v. Frank, 155 F.3d 159, 166 (3d Cir. 1998). The petitioner has the burden of proving that he has exhausted all of his available state remedies. See Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1998).

Appel presented this claim to the Pennsylvania Supreme Court and has thus, exhausted his state court remedies with respect to this claim.[13] Even if the court were inclined to believe that Appel had not exhausted his state court remedies, the state has explicitly waived the exhaustion requirement for any claim raised in his current habeas petition. See Letter from John Morganelli, District Attorney of Northampton County to Hon. Marjorie O. Rendell (Oct. 17, 1997) (Docket No. 25) ("this is to advise that the Commonwealth is waiving any exhaustion arguments").

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[13] In his Initial Brief to the Pennsylvania Supreme Court on his PCRA appeal, Appel argued that he was "denied the assistance of counsel during the time leading up to the trial court's competency determination." Initial Brief of Appellant, at 75. As he does in the current habeas petition, Appel contended that Kraft and Crowe's failure to subject his competency evaluation to meaningful adversarial testing amounted to a constructive denial of his right to counsel, and that prejudice must be presumed. See id. at 73-78. In fact, on this issue, Appel's Initial Brief is identical to his federal habeas petition. Cf. Petition, ¶¶ 250-61; Initial Brief, at 73-78. In his federal habeas petition, Appel also refers to the reply brief that he filed with the Pennsylvania Supreme Court. See Petition, at 126. That reply brief is not contained within the state court record available to the court.

Appel, though less clearly, also presented these claims to the trial court. See PCRA Petition, ¶¶ 34-38. Though his petition did not cite to Cronic, Appel described the factual basis of his denial of counsel claim. See id. Specifically, he alleged that he "was not afforded reliable adversarial testing on the question of his competency [or] the validity of his 'waivers'" because his counsel failed to develop and present information concerning his mental health which was available from his parents, his employment records, his girlfriend, his acquaintances, and Dr. Dattilio. Id. at ¶¶ 36, 37. Appel thus contended that his counsel "failed to render reasonably effective assistance and [] failed to investigate and present compelling evidence of Petitioner's severe mental illness." See id. at ¶ 35.

B. Applicability of AEDPA

As discussed above, AEDPA's deferential standard of review applies only to issues which the state court adjudicated on the merits. See *supra*, p. 11. Though Appel's denial of counsel claim was presented to the Pennsylvania Supreme Court, it was not adjudicated on its merits. When describing the issues presented for review, the state court reported that it must resolve "[w]hether Appel is entitled to relief because he was denied assistance of counsel during the original trial court proceedings." Appel, 689 A.2d at 897. When it turned to the merits of his claim however, the court characterized Appel's brief as asserting a claim that his stand-by counsel were ineffective during the period preceding the trial court's ruling on his competency. Id. at 904. The state Supreme Court disposed of this claim by concluding that because Kraft and Crowe were only stand-by counsel throughout the entire trial court proceedings, and because Appel represented himself, he had no valid claim for ineffective assistance of counsel. See id. at 904-05 ("Appel is not entitled to relief based on his claims of ineffectiveness of stand-by counsel" because "[h]aving knowingly and voluntarily waived the right to counsel, an appellant is not permitted to rely upon his own lack of legal expertise as a ground for a new trial" and he "cannot shift the responsibility for his performance to stand-by counsel") (quotations and citations omitted). The court also concluded that, even if it were to reach the merits of Appel's ineffective assistance claim, it would conclude that Appel's stand-by counsel acted appropriately in respecting their competent client's wishes not to investigate his competency. See id. at 906 ("We reject Appel's argument that stand-by counsel must ignore the pleadings of their criminal defendant clients and undertake an exhaustive survey of the client's personal background in an attempt to establish incompetency."). The court made no factual findings, however, about Kraft

and Crowe's status as counsel, as opposed to stand-by counsel, or their failure to act as counsel from the time they entered appearances on Appel's behalf on June 10, 1986, to the time when the court accepted his waiver of counsel on June 20, 1986. Similarly, the state trial court found that "stand-by counsel" performed competently in light of Appel's rejection of their assistance, but did not analyze Appel's claims with respect to the time period before Kraft and Crowe were appointed as his stand-by counsel on June 20, 1986.[14] See Commonwealth v. Appel, No. 1076, 1077, 1078 - 1986, slip op. at 29 (Pa. Ct. C.P. June 14, 1995).

The state courts thus condoned Kraft's and Crowe's conduct based on the trial court's post-hoc finding that Appel was competent, when the relevant questions were whether they were counsel or stand-by counsel prior to June 20, 1986, and what they were obligated to do when faced with a potentially incompetent client on June 12, 1986, who might be unable to make the rational, strategic choices which Pennsylvania law accords to criminal defendants (including waiver of counsel), and for whom a competency hearing had been scheduled by the trial judge for June 20, 1986. See id. (holding that Kraft and Crowe appropriately followed their client's wishes). The cases that the court cites in support of its conclusion that counsel should respect their client's decisions on strategic matters assume that the client was competent to make the decisions which counsel are obligated to respect. See Commonwealth v. Sam, 635 A.2d 603, 611 (Pa. 1993), cert. denied, 511 U.S. 1115 (1994) (record was "exceedingly clear" that defendant was competent to decide not to present mitigating factors at sentencing phase of trial);

[14] Even though the state courts made no factual findings on the significant issues pertaining to Appel's denial of counsel claim, no evidentiary hearing is required to elicit those facts because all facts necessary to resolve this claim are set forth in the record and are basically undisputed.

see also Commonwealth v. Taylor, 718 A.2d 743, 745 (Pa. 1998) (psychological and psychiatric evaluations found defendant competent to make decisions about whether to offer mitigating evidence in sentencing phase of trial). These cases do not discuss the duties that counsel face prior to a competency hearing when the trial court, as here, has ordered an evaluation of the defendant's competence to waive counsel, and are thus, irrelevant to the time period between June 10, and June 20, 1986.

The state court never considered Appel's claim that the actions of Kraft and Crowe from June 12, 1986, to June 20, 1986, constituted a constructive denial of counsel. The state court failed to address Appel's arguments that Kraft and Crowe were actually his counsel during the time leading up to the trial court's competency hearing, and instead referred to them only as the stand-by counsel they later became. See id. at 904-06. Additionally, the state court never cited, or described, the relevant federal precedent of Cronic, 466 U.S. at 653, and thus, never reached the merits of Appel's federal claim. See id. As a result, AEDPA's standards are inapplicable to Appel's constructive denial of counsel claim, and this court must examine, without "special heed to the underlying state court decision," whether Appel was constructively denied his Sixth Amendment right to counsel during the time before the trial court accepted his waiver of counsel.[15] Matteo, 1999 WL 164152, at * 6 (citing O'Brien, 145 F.3d at 20); Swann, 1999 WL

[15] Applying AEDPA's standards to Appel's denial of counsel claim would not change the court's resolution of this claim. Appel has produced clear and convincing evidence that Kraft and Crowe were his counsel during the time between June 10, and June 20, 1986, and it is undisputed that they did not function as his counsel during that time. See *infra*, pt. II.C. As Cronic, issued on May 14, 1984, was clearly established Supreme Court law at the time when Kraft and Crowe failed to subject his competency examination to meaningful adversarial testing, Appel has demonstrated that any state court decision approving Kraft's and Crowe's actions was an objectively "unreasonable application of clearly established Federal law" and "was based on an unreasonable determination of the facts in light of the evidence presented in the State court

86690 (finding that AEDPA did not apply when state court "does not mention or appear to apply the controlling federal precedent"); cf. Childress v. Johnson, 103 F.3d 1221, 1225 (5th Cir. 1997) (holding that, under AEDPA, state court decision is not immunized as good faith application of Supreme Court precedent because state court "entirely failed to apply the law pertaining to constructive denial of the right to counsel. Rather, the state courts fastened on (and rejected) the argument that [the defendant] received the ineffective assistance of counsel.").

II. The Sixth Amendment Right to Counsel

The Sixth Amendment provides criminal defendants with the right to counsel, which attaches at least at arraignment and continues through the first direct appeal. See Michigan v. Harvey, 494 U.S. 344, 357 (1990); Henderson, 155 F.3d at 166. The period between arraignment and trial is "perhaps the most critical period of the proceedings." Powell v. Alabama, 287 U.S. 45, 57 (1932). A defendant can waive his right to counsel, but must do so "voluntarily, knowingly and intelligently." See Brewer v. Williams, 430 U.S. 387, 403 (1977); Faretta v. California, 422 U.S. 806, 835 (1975). A criminal defendant is entitled not only to the presence, but also to the effective assistance of, counsel at every critical stage in the proceedings against him or whenever his "substantial rights . . . may be affected." Mempa v. Rhay, 389 U.S. 128, 134 (1967); see also Strickland v. Washington, 466 U.S. 668, 685 (1984) (finding that a lawyer's presence alone is insufficient to meet the constitutional requirement of "assistance of counsel"). "The presence of counsel . . . operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution." United States v. Wade, 388 U.S. 218, 227 (1967).

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proceeding." 28 U.S.C. § 2254 (d), (e) (Supp. 1998).

A. Appel's Right to Counsel Attached Prior to, and Continued Through, His Court-Ordered Competency Hearing

A competency hearing is a "critical stage" in the prosecution at which a criminal defendant is entitled to the assistance of counsel because counsel's absence at a competency hearing "might derogate from the accused's right to a fair trial." Id. at 226-27. The right to counsel depends not on the result of the proceeding at issue, but rather, on the premise that counsel's "partisan advocacy" will "assure fairness in the adversary criminal process." United States v. Cronic, 466 U.S. 648, 655-56 (1984) (citing Herring v. New York, 422 U.S. 853, 862 (1975); and United States v. Morrison, 449 U.S. 361, 364 (1981)); see also Coleman v. Alabama, 399 U.S. 1, 9 (1970) (plurality opinion) (holding that proceeding is a "critical stage" if "potential substantial prejudice to defendant's rights" may result without counsel's presence).

If counsel's absence, actual or constructive, resulted in no adversarial testing of the state's evidence of competency, Appel's right to a fair trial would be fundamentally compromised. See Cooper v. Oklahoma, 116 S.Ct. 1373, 1376 (1996) (emphasizing that right not to be tried while incompetent is fundamental). The Supreme Court has found that a defendant had a Sixth Amendment right to consult with his counsel about a competency evaluation designed to explore his competency to stand trial, his sanity at the time of the offense, and his future dangerousness for use during the sentencing phase of his capital trial. See Powell v. Texas, 492 U.S. 680, 681 (1989) (per curiam). A defendant also has the right to the assistance of counsel before deciding whether to submit to a pretrial psychiatric interview, for decisions involving a defendant's participation in such an interview are "literally a life or death matter and [are] difficult even for an attorney," and thus "a defendant should not be forced to resolve such an important issue

without the guiding hand of counsel." Estelle v. Smith, 451 U.S. 454, 471 (1981) (quotations omitted). Other courts have evaluated counsel's performance at competency hearings under the Strickland standard, which necessarily implies that the Sixth Amendment right to counsel is implicated at a competency hearing.[16] See Hull v. Freeman, 932 F.2d 159, 167 (3d Cir. 1991) (applying Strickland standard to evaluate counsel's presentation of evidence at a competency hearing).

Before the trial court determined that his waiver was knowing, intelligent and voluntary, and thus, accepted his waiver of counsel, Appel was entitled to the assistance of counsel to aid in his defense. See Brewer v. Williams, 430 U.S. 387, 404 (1977) (state bears the burden of demonstrating that waiver of right to counsel was intentional); Pate v. Robinson, 383 U.S. 375, 384 (1966) ("it is contradictory to argue that a defendant may be incompetent and yet knowingly or intelligently 'waive' his right[s]"); Henderson, 155 F.3d at 166 (waiver is not effective unless judge conducts colloquy to ensure that defendant's action is voluntary, knowing and intelligent); United States v. Purnett, 910 F.2d 51, 55 (2d Cir. 1990) ("trial court cannot simultaneously question a defendant's mental competence to stand trial and at one and the same time be convinced that the defendant has knowingly and intelligently waived his right to counsel").

B. Appel Claims that He Was Denied Counsel - Not that He Received Ineffective Assistance of Counsel

Defendants challenging their convictions or sentences based on their counsel's performance usually claim that their counsel performed below a professionally reasonable standard. See Childress, 110 F.3d at 1228 ("The vast majority of Sixth Amendment right to

[16] Strickland held that the Sixth Amendment entitles a criminal defendant to the reasonably effective assistance of counsel. See Strickland, 466 U.S. at 687-88.

counsel claims can be analyzed satisfactorily under the two-pronged performance and prejudice test of Strickland"). To sustain such a claim for ineffective assistance of counsel under the Sixth Amendment, a habeas petitioner must show that his counsel's performance was objectively deficient and that this deficient performance prejudiced his defense. See Strickland, 466 U.S. at 687. In evaluating whether counsel's performance was deficient, "the court must defer to counsel's tactical decisions," avoid "the distorting effects of hindsight" and give counsel the benefit of a strong presumption of reasonableness. Id. at 689; Government of the Virgin Islands v. Weatherwax, 77 F.3d 1425, 1431 (3d Cir.), cert. denied, 117 S. Ct. 538 (1996). Prejudice is established if "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Lockhart v. Fretwell, 506 U.S. 364, 369 (1993) (quotations omitted).

There are several situations, however, where the petitioner need not prove that he was prejudiced by his counsel's performance. As explained in Cronic, the most obvious is complete denial of counsel. The Court went on to say, however, that

> [t]he presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

Cronic, 466 U.S. at 659-60; United States v. Pungitore, 15 F. Supp. 2d 705, 719 (E.D. Pa. 1998). Cronic's rationale is based upon the language of the Sixth Amendment which "requires not merely the presence of counsel for the accused, but 'Assistance,' which is to be 'for his defence' . . . If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated." Cronic, 466 U.S. at 654, n.11 (noting that "[i]n some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided.

Clearly, in such cases, the defendant's Sixth Amendment right to 'have Assistance of counsel' is denied"). "To hold otherwise could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." Id. at 654 (citation omitted). Appel argues that Cronic controls his case, and relieves him from proving prejudice because his appointed counsel, who did not even consider themselves to be acting as his counsel, failed to subject the competency evaluation to "meaningful adversarial testing." See Petition, at ¶ 249. The state's Answer fails to address this claim in any meaningful way, for it fails to even mention the applicability of Cronic. See Answer, at 26-37; Respondent's Memorandum of Law In Re Petition for Writ of Habeas Corpus ("Mem."), at 8-11.

The Cronic analysis is applied "sparingly." Toomey v. Bunnell, 898 F.2d 741, 744 n.2 (9th Cir. 1990);see also Childress, 103 F.3d at 1229. It is implicated only in cases where the petitioner alleges that his counsel was "not merely incompetent but inert." Childress, 103 F.3d at 1228; Tippins v. Walker, 77 F.3d 682, 686 (2d Cir. 1996) (defendant was constructively denied counsel when counsel slept through testimony of key witnesses). Cronic also applies when counsel fails to "play[] a role necessary to ensure that the proceedings are fair" because the Sixth Amendment "guarantees more than just a warm body to stand next to the accused during critical stages of the proceedings." Patrasso v. Nelson, 121 F.3d 297, 304 (7th Cir. 1997). If the petitioner alleges, on the other hand, that his counsel's performance was deficient, or incompetent, counsel's conduct will be evaluated under the Strickland two-part test. See id. at 1229; Scarpa v. Dubois, 38 F.3d 1, 15 (1st Cir. 1994), cert. denied, 513 U.S. 1129 (1995) (Strickland applies to allegations of "maladroit performance" as opposed to "non-performance").

Cronic has often been applied when defendants allege that their counsel failed to file an appeal when requested to do so. See Penson v. Ohio, 488 U.S. 75, 88 (1988) (defendant was constructively denied counsel during appeal when counsel filed a defective Anders brief and withdrew from representing the defendant); United States v. Washington, No. 97-2371, 1997 WL 327459 (E.D. Pa. June 12, 1997) (ordering evidentiary hearing to determine whether defendant asked counsel to file appellate brief in order to determine whether defendant was constructively denied counsel). Cronic has also been applied when defendant's counsel was operating under an actual conflict of interest. See Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978); United States v. Gambino, 788 F.2d 938, 950 (3d Cir. 1986); Government of the Virgin Islands v. Zepp, 748 F.2d 125, 131 (3d Cir. 1984).

Of most relevance to Appel's claims, Cronic has been applied when counsel utterly failed to function as counsel by providing no assistance to the defendant. See Rickman v. Bell, 131 F.3d 1150, 1157 (6th Cir. 1997) (prejudice was presumed when counsel combined a "total failure to actively advocate his client's cause with repeated expressions of contempt for his client"); Blankenship v. Johnson, 118 F.3d 312, 317-18 (5th Cir. 1997) (defendant was constructively denied counsel when appellate counsel did nothing on his behalf); Childress, 103 F.3d at 1231 (counsel offered no advice to defendant during guilty plea and conducted no investigation or research to assist the defendant); Tippins, 77 F.3d at 686-87 (presuming prejudice when adversarial nature of trial was repeatedly suspended because defense counsel slept through a substantial portion of the trial); Tucker v. Day, 969 F.2d 155, 159 (5th Cir. 1992) (presuming prejudice when counsel at resentencing failed to confer with defendant and "made no attempt to represent his client's interests"); cf. Groseclose v. Bell, 130 F.3d 1161, 1169 (6th Cir. 1997),

cert. denied, 118 S. Ct. 1826 (1998) (finding that court need not determine whether to apply Strickland or Cronic because prejudice clearly existed when counsel failed "to have any defense theory whatsoever," failed "to conduct any meaningful adversarial challenge" through cross-examination or objection, and followed directions of co-defendant's counsel).

C. Application of Cronic to Time Period Before Appel's Competency Hearing

In order to obtain relief under Cronic, and thus avoid the need to prove that he was prejudiced by his counsel's performance, Appel must demonstrate that he was denied the assistance of counsel such that the question of whether he was competent to waive his right to counsel was never subjected to "the crucible of meaningful adversarial testing." Cronic, 466 U.S. at 656; Strickland, 466 U.S. at 686. The Sixth Amendment requires not only the presence of counsel, but also the effective assistance of counsel for the accused's defense. See Cronic, 466 U.S. at 654. Applying these standards to the facts of Appel's case, it is clear that Kraft and Crowe were Appel's counsel between June 10, 1986, and June 20, 1986, and they failed to conduct any investigation that would submit the question of Appel's competency to "meaningful adversarial testing." Id. at 659.

Kraft and Crowe were Appel's attorneys between the day they were assigned by the public defender and entered appearances on his behalf, June 10, 1986, and the day the court accepted Appel's waiver of counsel, June 20, 1986. Despite their protestations to the contrary, Kraft and Crowe became Appel's counsel when the public defender's office assigned them to be Appel's counsel in response to his request for counsel and they entered appearances on his behalf. See PCRA Tr. 5/12/95, at 145, 176. The Pennsylvania Rules of Criminal Procedure, both in 1986 and now, provide that, once an attorney has entered an appearance with the court,

"[c]ounsel for a defendant may not withdraw his or her appearance except by leave of court." Pa. R. Crim. P. 302 (a), (b). The Rules also provide that "[w]hen the defendant seeks to waive the right to counsel after the preliminary hearing, the judge shall ascertain from the defendant, on the record whether this is a knowing, voluntary and intelligent waiver of counsel." Pa. R. Crim. P. 318 (c). The defendant's waiver is not effective until the court finds, after colloquy, that it is "knowing, voluntary and intelligent," and accepts the waiver. See Faretta, 422 U.S. at 835; United States v. Leggett, 162 F.3d 237, 249 (3d Cir. 1998); United States v. Salemo, 61 F.3d 214, 218 (3d Cir. 1995). Moreover, as previously discussed, Kraft and Crowe could not have been stand-by counsel during this time period because Rule 318 (d) only provides for the appointment of stand-by counsel after the court accepts a defendant's waiver of counsel.

The record also reveals that, on June 12, 1986, the trial court referred to Kraft and Crowe as Appel's counsel several times and they agreed that they were his counsel. See *supra*, n. 4. Additionally, Kraft and Crowe continued to act as counsel in some capacities between June 10 and June 20, 1986. They visited Appel in jail "on almost [a] daily basis" during this period and they discussed, among other things, the purpose of his evaluation by Dr. Schwartz and the statements he had given to police investigators. PCRA Tr. 5/12/95, at 153, 172-74, 228-33. The fact that Appel's motivation for seeking counsel, his desire to have visitors and assistance with his financial affairs, was not actually to obtain legal representation does not compel the conclusion that Kraft and Crowe were not his counsel. See id. at 227. Though Appel's statements perhaps explain why Kraft and Crowe failed to investigate the issue of Appel's competency, they do not make Kraft and Crowe anything less than his counsel until the court approved his waiver.

The state opposes Appel's claim on grounds that Kraft and Crowe were not Appel's counsel during the relevant time period, but were only stand-by counsel.[17] See Answer, at 26-29; Mem., at 9-11. Though the state PCRA courts repeatedly characterized Kraft and Crowe as Appel's "stand-by counsel" when analyzing claims relating to this time period, those courts never made factual findings that Kraft and Crowe were stand-by counsel at any time before June 20, 1986.[18] See Appel, 689 A.2d at 905 (explaining that Appel "argues that his court-appointed stand-by counsel were ineffective during the period beginning when he first requested to waive counsel until the trial court accepted his waiver" and that "Appel's stand-by counsel were faced with a client who insisted that he was competent"); Appel, No. 1076, 1077, 1078 - 1986, slip op. at 29-30 (finding that stand-by counsel performed competently). Moreover, the record is clear that Kraft and Crowe only became Appel's stand-by counsel on June 20, 1986, when the trial judge appointed them as stand-by counsel pursuant to Pa. R. Crim. P. 318 (d). See Hearing Tr. 6/12/86, at 3. Pennsylvania Rule of Criminal Procedure 318 (d), in 1986 and now, provides that

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[17] Though the state claimed at oral argument that Kraft and Crowe were never Appel's counsel, the state's Answer to Appel's Petition contradicts its position at oral argument. In its Answer, the state admits that "upon petitioner's arrest on June 6, 1986, Ellen Kraft, Esquire and Lorenzo W. Crowe, Esquire were appointed by the court to act as petitioner's counsel" and "admit[s] that the petitioner had a 6th Amendment right to the assistance of counsel during the time leading up to the trial court's competency determination." Answer, at 26, 28. When referring to Kraft and Crowe's actions between June 10, and June 20, 1986, moreover, the Answer repeatedly refers to them as Appel's "defense counsel." See id. at 26-29.

[18] AEDPA obligates federal courts to presume that a "determination of a factual issue made by a State court" is correct unless the petitioner can rebut that presumption by "clear and convincing evidence." 28 U.S.C. § 2254 (e) (1) (Supp. 1998). The state courts' references to Kraft and Crowe as "stand-by counsel" are not factual findings, but rather, misconstructions of Appel's habeas claims. See *supra*, pt. I.B. Moreover, even if I were to construe these references as factual findings, and therefore apply AEDPA here, given the state courts' descriptions of the events preceding Appel's competency hearing, there is clear and convincing evidence that Kraft and Crowe were Appel's counsel, as even the state admits. See Answer, at 26.

"[w]hen the defendant's waiver of counsel is accepted, standby counsel may be appointed for the defendant." Kraft and Crowe could not have been stand-by counsel within the contemplation of this rule at any time before June 20, 1986, because they were not designated as stand-by counsel until that time and Appel's waiver of counsel had not yet been accepted. Before June 20, 1986, the record clearly and convincingly establishes, and the state concedes,[19] that Kraft and Crowe bore all the responsibilities of counsel of record.

Because Kraft and Crowe were Appel's counsel between June 10 and 20, 1986, they had the obligation to act as counsel at Appel's competency hearing by subjecting the state's evidence of competency to "meaningful adversarial testing." Cronic, 466 U.S. at 660. The record is undisputed that they failed to do so; they did not investigate his background, speak to his family or friends, or obtain his health or employment records. See PCRA Tr. 5/15/95, at 9; PCRA Tr. 5/12/95, at 162-67, 195, 227. The state agrees that Kraft and Crowe did not investigate Appel's competency, but contends that they had no duty, or authority, to do so. See Answer, at 27-28. Even though Appel directed his counsel not to investigate his competency, they abandoned their duty to both the court and their client when they decided not to conduct any investigation on this issue. The Third Circuit has found that an attorney may not choose to remain silent at a competency hearing for reasons similar to those advanced by Kraft and Crowe here. See Hull v. Freeman, 932 F.2d 159, 168 (3d Cir. 1991). Confronting the case of counsel who presented no evidence at his client's competency hearing, including two recent psychiatric reports that his

[19] The state's Answer concedes that Kraft and Crowe were appointed by the court to act as Appel's counsel but that he refused their representation and exercised his right of self-representation. See Answer, ¶ 249. Though the state is correct that Appel was self-represented after June 20, 1986, the record is clear that he was represented by counsel during the period prior thereto.

client was incompetent, because he believed that his client was competent "based on his own observations," and because his client "had expressed a desire to be found competent," the Third Circuit found that "[n]either of these proffered explanations are legitimate strategic justifications." Id. at 168. The court found, moreover, that it is "axiomatic that the desire of a defendant whose mental faculties are in doubt to be found competent does not absolve counsel of his or her independent professional responsibility to put the government to its proof at a competency hearing when the case for competency is in serious question." Id. at 169;see also Strickland, 466 U.S. at 690-91 (counsel's decision not to investigate cannot be construed as a strategic choice when counsel possess no factual information on which such a decision could be based); Kraft and Crowe were not free, therefore, to abstain from all investigations of Appel's competency either because they believed him to be competent or because he told them not to challenge his competency once the court, on June 12, 1986, scheduled a hearing on Appel's competence to waive counsel for June 20, 1986. Though counsel for Hull possessed substantial evidence that Hull was actually incompetent whereas Kraft and Crowe did not, their failure to even attempt to obtain further information about Appel's competency clearly prevented them from discovering such information as existed. Kraft's and Crowe's failure to conduct even minimal investigation into Appel's competency prevented the court from receiving information which was essential to a meaningful adversarial testing at his June 20, 1986, hearing and resulted in a constructive denial of counsel. This failure further prevented Dr. Schwartz, the court-appointed psychiatrist, upon whose evaluation the court relied, from receiving such information. Kraft and Crowe were thus "inert" on the issue of competency, as they concede. See *supra*, n. 9; Holsomback v. White, 133 F.3d 1382, 1388 (11th Cir. 1998) (finding that counsel's failure to

conduct pretrial investigation into lack of medical evidence of sodomy, in a sodomy prosecution, was unreasonable); Patrasso, 121 F.3d at 304 (applying Cronic when counsel "entirely failed to represent his client" when he failed to investigate mitigating factors for sentencing or contradict the prosecution's case); United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989) ("counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made"); United States v. Baynes, 687 F.2d 659, 667 (3d Cir. 1982) (finding counsel's failure to investigate evidence against the defendant was not harmless error); United States v. Williams, 615 F.2d 585, 594 (3d Cir. 1980) (admonishing counsel for failing to investigate an available defense); ABA Standards for Criminal Justice, Defense Function Standards 4-4.1 (a) (3d ed. 1993) ("The duty to investigate exists regardless of the accused's admissions . . . or the accused's stated desire to plead guilty.").[20]

The state contends, however, that even if Crowe and Kraft were Appel's counsel at the time of the competency hearing, they had no duty to question Appel's competency when he instructed them not to, when they believed that he was competent based on their own judgment, and when Appel had not authorized them to talk to any of the people who might possess collateral information suggesting that he was incompetent. See Answer, at 27-28. The state contends that requiring counsel to investigate in these circumstances would place a crushing burden on defense counsel to investigate thoroughly the competency of every criminal defendant. See id. The court does not agree. Though it may be disputed whether Appel's attorneys had

[20] ABA Standard 4-4.1 (a) was substantially similar in 1986, when Appel's competency was evaluated. See Standards for Criminal Justice, Defense Function Standards 4-4.1 (a) History of Standard (3d ed. 1993).

sufficient information to question his competency on June 12, 1986, it is without doubt that they failed to perform their duty to investigate his competency after the trial judge, on June 12, 1986, ordered a hearing to determine his competency to waive counsel. No "crushing burden" is placed on defense counsel when they are required to investigate the defendant's competency in a capital murder case because the court has ordered a competency hearing.

Contrary to the state's assertion, finding that Appel was constructively deprived of counsel at his competency hearing would not drastically alter the duties of criminal defense counsel. Counsel here had the obligation to investigate the petitioner's competency once the court placed the petitioner's competency directly at issue by ordering a competency evaluation and scheduling a competency hearing. Moreover, counsel is not obliged to develop frivolous arguments in favor of incompetency. See Cronic, 466 U.S. at 656 n.19 (noting that "the Sixth Amendment does not require that counsel do what is impossible or unethical"). Rather, counsel is only required to act as an advocate -- to conduct a meaningful investigation into a defendant's competency and to present information gleaned from that investigation at a competency hearing, and to the evaluating psychiatrist, if the information suggests an alternative version of the truth about the defendant's competency. The scheduling of the competency evaluation and hearing, aside from any other information available to counsel, triggered the obligation to investigate. See id. at 656 (holding that the Sixth Amendment entitles an accused to "counsel acting in the role of an advocate") (citation omitted); see also Kimmelman v. Morrison, 477 U.S. 365, 386 (1986) (holding that counsel's performance was deficient because he failed to conduct a reasonable investigation of his client's defenses or to make a reasonable decision that a particular investigation was not required); Groseclose, 130 F.3d at 1170 (holding that counsel was

ineffective for failing to investigate client's defenses at all). Such a duty is consistent with counsel's general duty to investigate the facts relevant to the charges and penalties facing their clients.[21]

In conclusion, it is clear that the Sixth Amendment guaranteed Appel's right to counsel during the time leading up to the court-ordered hearing on his competency to waive counsel, and at the hearing, and that Kraft and Crowe were his counsel, not his stand-by counsel, during that time. In derogation of their duties as counsel, they conducted no investigation of his competency during that time, and thus, entirely failed to develop information that would have subjected the question of Appel's competency to waive his right to counsel to meaningful adversarial testing. Their failure to act constituted a constructive denial of Appel's Sixth Amendment right to counsel under Cronic.

D. Appropriate Remedy for the Denial of Counsel

Appel was constructively denied counsel at his competency hearing in violation of the Sixth Amendment. As Appel is not required to demonstrate that this violation of his constitutional rights resulted in prejudice, he is entitled to habeas corpus relief. See Cronic, 466 U.S. at 659-60. The court must therefore determine the proper scope of relief to which Appel is entitled.

The violation of Appel's right to counsel occurred during the time preceding his

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[21] The state courts made no factual findings that Kraft and Crowe conducted any investigation into the issue of Appel's competency to waive his right to counsel. Even if the state courts' opinions could be construed as finding that they performed the duties of counsel, and I were thus obligated to apply AEDPA's standards, the record is undisputed that Kraft and Crowe did not function as the counsel envisioned by the Sixth Amendment during that time period and any factual finding to the contrary would be easily overturned by clear and convincing evidence.

competency hearing, a "critical stage" of the proceedings against him. See Cronic, 466 U.S. at 659. When a Sixth Amendment violation, like the denial of counsel described in Cronic, occurs during pre-trial proceedings, the Third Circuit has determined that the proper remedy is a new trial. See Henderson, 155 F.3d at 171. In Henderson, the Third Circuit found that the deprivation of counsel at a suppression hearing resulted in "much more than an opportunity to have his confession suppressed." Id. at 169. Instead, Henderson suffered a "procedural, structural defect which may have had repercussions in plea bargaining, discovery and trial strategy that would not be cured by a new suppression hearing alone" for the "existence of structural defects . . . requires automatic reversal of the conviction because they infect the entire trial process." Id. at 169-70, 171 (quoting Brecht v. Abrahamson, 507 U.S. 619, 629-30 (1993)). The court concluded that "the deprivation of Henderson's right to counsel at the suppression hearing is one of the 'structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards" and thus require a new trial to correct. Id. at 170 (quoting Arizona v. Fulminante, 499 U.S. 279, 309 (1991)).

A competency hearing designed to determine the accused's ability to waive his right to counsel, even more than a suppression hearing, is a critical stage of the proceedings "because its results might settle the accused's fate and reduce the trial itself to a mere formality." Henderson, 155 F.3d at 166 (quotation omitted). Here, as in Henderson, the denial of counsel had an impact on all subsequent stages of the prosecution against Appel, for there was no adversarial testing of Appel's competency to waive his right to counsel and therefore, no assurance that his "fundamental right" to a competency determination, and to counsel, upon which "depends the main part of those rights deemed essential to a fair trial," was preserved. Cooper v. Oklahoma,

517 U.S. 348, 354 (1996).

The state argues that this violation can be cured by affording Appel a new competency hearing, and that the PCRA trial court has already provided this remedy by holding an evidentiary hearing in 1995, and concluding that Appel was competent in 1986. The Supreme Court disfavors such retrospective competency hearings and has determined that one would be inadequate when conducted six years after the trial "given the inherent difficulties of such a nunc pro tunc [competency] determination under the most favorable of circumstances." Drope v. Missouri, 420 U.S. 162, 183 (1975) (granting the defendant a new trial when trial court refused to conduct a hearing to determine the defendant's competence to stand trial); Pate v. Robinson, 383 U.S. 375, 386-87 (1966) (ordering a new trial for a defendant whose constitutional rights were violated when he did not "receive an adequate hearing on his competence to stand trial" in part because of the "difficulty of retrospectively determining an accused's competence to stand trial"); Dusky v. United States, 362 U.S. 402, 403 (1960) (per curiam) (ordering a new trial when the evidence is insufficient to support the finding that petitioner was competent to stand trial given the "resulting difficulty of retrospectively determining the petitioner's competency as of more than a year ago"). The Third Circuit has also disapproved of retrospective competency hearings as the appropriate remedy for unconstitutional deprivations of counsel. In Hull, the court held that if the district court found a Sixth Amendment violation during a competency hearing, "then the appropriate remedy would have been to vacate [the accused's] guilty plea, not order a new competency hearing." Hull, 932 F.2d at 169; see also Henderson, 155 F.3d at 172 (awarding new trial for Sixth Amendment violation during suppression hearing because the constitutional error during that one stage "spilled over into the trial itself").

The unconstitutional deprivation of counsel at Appel's competency hearing infected all later stages of his prosecution and rendered all subsequent proceedings against him void. See Hull, 932 F.2d at 169 n. 8. Had Kraft and Crowe performed their function as Appel's counsel, the evidence which they should have presented to the evaluating psychiatrist, Dr. Schwartz, may have changed both her opinion and the court's opinion about Appel's competency to waive his right to counsel. Once the trial court concluded that he was competent to waive his right to counsel, Appel was deprived of the guiding hand of counsel at every later stage of the proceedings which eventually lead to his death sentence. Without the services of counsel who were obligated to investigate thoroughly the prosecution's case against him, and to advise him about cooperating with the prosecution, Appel was able to proceed promptly toward the death penalty he professed to desire. Had Appel been represented by counsel, all proceedings thereafter may have changed dramatically, and thus, the lack of a meaningful adversarial testing at the competency hearing infected all that followed. See Henderson, 155 F.3d at 166. The appropriate remedy for this constitutional violation under Supreme Court and Third Circuit precedent is, therefore, to vacate Appel's conviction and sentence and to award him a new trial. See id. at 169.

CONCLUSION

Appel's Sixth Amendment right to counsel was constructively denied during the time between June 10, 1986 and June 20, 1986. As a result of this constitutional violation, which infected all subsequent proceedings against him, Appel's conviction and sentence must be vacated. Because the resolution of his Sixth Amendment claim demands that Appel receive a new trial, the court need not resolve his other claims of error. Appel's petition for habeas corpus

is, therefore, conditionally granted.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN DANIEL APPEL	:	CIVIL ACTION
	:	
v.	:	
	:	
MARTIN HORN, et al.	:	NO. 97-2809

ORDER

AND NOW, this 21st day of May, 1999, after careful consideration of Martin Daniel Appel's Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254, Defendants' Answer, all documents filed in support thereof, and the record of Appel's case in state court, and after oral argument, IT IS HEREBY ORDERED that the Petition for a writ of habeas corpus is GRANTED. The execution of the writ of habeas corpus, however, is STAYED for 180 days from the date of this order to permit the Commonwealth of Pennsylvania to provide petitioner with a new trial. If petitioner is not provided with a new trial within the time specified, the writ shall issue, and Defendants shall release Appel from any incarceration or other restraint.

William H. Yohn, Jr., J.